DISPUTE SETTLEMENT MECHANISMS

AN ANALYSIS OF THE DISPUTE SETTLEMENT PROVISIONS OF THE CANADA-U.S. FREE TRADE AGREEMENT PRELIMINARY TRANSCRIPT

BACKGROUND PAPER NOVEMBER 4, 1987

GOVERNMENT OF ONTARIO

DISPUTE SETTLEMENT
IN THE CANADA-U.S. TRADE AGREEMENT

prepared for the Government of Ontario by
Philip W. Slayton and John J. Quinn of
Blake, Cassels & Graydon
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CONTENTS

INTRODUCTION..... 1

WHY IS AN EFFECTIVE DISPUTE SETTLEMENT MECHANISM NECESSARY?..... 3

HOW SHOULD WE EVALUATE A DISPUTE SETTLEMENT MECHANISM..... 5

WHAT HAS BEEN AGREED UPON?..... 7

EVALUATING THE AGREEMENT'S DISPUTE SETTLEMENT MECHANISM..... 15

CONCLUSION..... 30

TECHNICAL APPENDIX..... 31

DISPUTES INVOLVING CHANGES IN ANTIDUMPING AND COUNTERVAIL LEGISLATION..... A-3

BINATIONAL PANEL REVIEW OF FINAL DETERMINATION IN ANTIDUMPING AND COUNTERVAIL CASES..... A-6

DISPUTE SETTLEMENT FOR SAFEGUARD ACTIONS..... A-14

GENERAL DISPUTE RESOLUTION MECHANISM..... A-19

I. INTRODUCTION

One of the most important benefits Canada sought to obtain in its negotiations with the United States was guaranteed access to the U.S. market--access at the present time constrained by both U.S. laws and the method of their application. The potential value of improved access to the U.S. market is taken as a given in this paper. We do not intend to review the general arguments on the merits and demerits of bilateral free trade, but rather to evaluate the new bilateral treaty's likely contribution to achieving that goal.

Without an effective dispute settlement mechanism to control U.S. trade remedy laws and their administration, Canada-U.S. "free trade", for Canada at least, will not be all that free. That is because, without such a mechanism, unhampered access to the U.S. market cannot be guaranteed.

The dispute settlement mechanism that apparently has been agreed upon by Canada and the United States, as set forth in the Canada-U.S. document entitled "Elements of the Agreement", falls short of an acceptable mark. The mechanism does not impose effective controls on domestic U.S. trade remedies that bedevil Canadian industry. It is

not "binding", if that word is to be given any serious meaning. There is essentially no provision for provincial or private sector participation. And the mechanism may substantially violate an important precept of institutional design - that, if possible, the use of an institution should be simple, quick and cheap. (Our analysis in this paper is based entirely upon "Elements of the Agreement": this document states that "These Elements of the Agreement are the agreed basis of the Agreement and will be translated into a legal document by the negotiating teams." The dispute resolution provisions of the final Agreement will require fresh scrutiny.)

II. WHY IS AN EFFECTIVE DISPUTE SETTLEMENT MECHANISM NECESSARY?

There are three broad reasons why Canada requires an effective dispute settlement mechanism in the Agreement.

First, the existing U.S. method for resolving certain trade disputes, notably (but not exclusively) dumping and subsidy disputes, which works to deny market access to Canada, should be replaced with an alternative mechanism. Implicit in this first reason, of course, is that the underlying American law must be changed so far as Canada is concerned. Even more important, however, is that the alternative mechanism be capable of preventing the protectionist application of U.S. law by administrative officials.

Second, no agreement is worth much if it cannot be enforced. The domestic law of contract in every corner of the world recognizes that this is so. It is the realistic possibility of enforcement, whatever the forum, that makes an agreement "binding" and therefore an agreement that can be relied upon. If an agreement is not

binding, then the stronger party is free to take advantage of its greater strength. If the means of enforcement are such that the injured party will never seek enforcement - for example, because it will suffer more than the perpetrator of the injury - then the agreement cannot properly be regarded as binding.

Third, any agreement creates new disputes. What do certain provisions really mean? What is the correct method of implementing the agreement? There must be a way of resolving these issues.

Failure to have an effective dispute settlement mechanism will perpetuate continued application of existing U.S. trade remedies; allow administrative regulation and government legislation inconsistent with the free trade agreement; and put into question the integrity of negotiated concessions and particularly improved market access. In summary, failure to have an effective dispute settlement mechanism will deny market access.

III. HOW SHOULD WE EVALUATE A DISPUTE SETTLEMENT MECHANISM?

The reasons why an effective dispute settlement mechanism is thought necessary suggest some appropriate criteria for evaluating any mechanism that is proposed.

First, does the mechanism protect and promote improved market access? In particular, does it impose effective limits on domestic remedies which work to deny market access?

Second, does the mechanism produce binding decisions, in the sense that realistic remedies and sanctions for non-compliance will redress breaches, encourage compliance with the agreement, and thereby offset disparities in political and economic strength?

Third, is the mechanism workable? Is it as quick, simple and cheap as possible? Does it minimize opportunities for harassment and strategic litigation? Is it transparent and fair?

Fourth, does the mechanism provide for appropriate participation by all interested parties - in particular, by the provinces and the private sector? Some think that there must be a role for the provinces, or otherwise there will have to be excessive reliance on federal willingness to respond to provincial concerns. Likewise, it may be argued that the private sector should have, as of right, significant protection, and at the very least should not be deprived of whatever access to remedies it now possesses.

These are the four evaluation criteria of market access, binding decisions, workability and participation.

IV. WHAT HAS BEEN AGREED UPON?

"Elements of the Agreement" devotes approximately twelve of its thirty-five pages to dispute settlement. But although the subject loomed large in the minds of the negotiators, some of the text dealing with dispute settlement is unclear and uncertain. Presumably the Agreement itself will remedy these defects, and some of the points we raise below may well be clarified by that final document.

"Elements of the Agreement" sets forth two broad dispute settlement mechanisms: (1) binational panel dispute settlement in antidumping and countervailing duty cases (the "AD/CV mechanism"); and (2) so called "Institutional Provisions". The AD/CV mechanism will apply both to disputes arising from legislative changes to antidumping and countervail laws, and to disputes arising from final determinations of dumping, subsidization and material injury by national officials.

The Institutional Provisions clearly apply to disputes under the Agreement itself, and to disputes arising out of the application to Canada under the Agreement of section 201 of the Trade Act of 1974 (whereby

the U.S. restricts increased import flows that adversely affect U.S. industries). Moreover, these procedures presumably apply to (amongst other things) disputes over section 301 (which deals with foreign trade practices that violate international agreements to which the U.S. is a party or that are otherwise "unjustifiable, unreasonable or discriminatory"), and disputes arising from section 337 of the Tariff Act of 1930 (which allows U.S. parties to address "unfair methods of competition and unfair acts in the importation of articles to the United States").

What follows is a brief summary of these two distinct dispute settlement mechanisms.

A. The AD/CV mechanism. The AD/CV mechanism has two parts, one dealing with legislation, and the other with administrative decisions.

1. legislation

That part of the AD/CV mechanism dealing with antidumping and countervailing legislation has these components:

(a) there are to be no mandatory changes in existing laws;

(b) if laws are changed after the Agreement's implementation, then for the new laws to be applicable to the other Party they must so specify; there must be consultation before any changes; and changes must be consistent with the GATT Antidumping and Subsidies Codes, and with the object and purposes of the Agreement;

(c) a panel may recommend modifications to post-Agreement changes in the law; recommendations trigger a consultation process; if the consultation process is unsuccessful, then the offended party can take "comparable legislative or equivalent executive action" or terminate the Agreement;

(d) the Parties will try to develop a "substitute system of laws"; if at the end of seven years they have not done so, either Party may terminate the Agreement.

2. administrative decisions

That part of the AD/CV mechanism having to do with the review of administrative decisions provides as follows:

(a) existing antidumping and countervail laws of both parties will continue to govern administrative decisions;

(b) ad hoc panels replace judicial review;

(c) only a Party can trigger the panel process;

(d) a panel decision is "binding" - this means that there is remand to the appropriate investigating body for action if the panel does not uphold the decision; and

(e) the panel process takes effect after January 1, 1989.

"Elements of the Agreement" has some discussion about the composition of panels and panel procedures (it is not clear whether this discussion applies both to panels that recommend modifications in the law and to panels that review administrative decisions).

B. Institutional provisions. These general dispute settlement provisions can be summarized as follows:

(1) if a dispute arises that falls both under the Agreement and the GATT, then the complaining Party may choose its forum which then becomes the exclusive forum;

(2) the Canada-United States Trade Commission will generally supervise implementation of the Agreement; it will take decisions by consensus;

(3) each Party shall give the other written notice of any proposed or actual legislation, regulation or governmental procedure or practice that it considers might materially affect the operation of the Agreement;

(4) either Party may request consultations on any matter affecting the Agreement; if the dispute is not quickly resolved by consultations, either Party may call upon the Commission to mediate;

(5) the Commission shall refer all safeguard disputes, and may refer any other dispute, to binding arbitration; if a Party fails to implement an arbitration award, and the Parties cannot agree on compensation, then the injured Party may suspend the application of equivalent benefits;

(6) if Commission mediation attempts fail (and, presumably, the Commission has not referred the matter to binding arbitration), a Party can require the Commission to establish a panel of experts to consider the matter;

(7) upon receipt of a panel's final report, the Commission "shall agree on a resolution of the dispute"; whenever possible, the solution shall be non-implementation or removal of a measure not conforming with the Agreement or, failing such a solution, compensation to the affected Party;

(8) if the Commission does not resolve the dispute shortly after receiving a panel's final report, the injured Party may suspend

the application of benefits of equivalent effect.

As well, the Agreement will contain provisions whereby either or both Parties may in certain circumstances submit inter- pretations of the Agreement to domestic administrative or judicial bodies. On the matter of services, Elements of the Agreement states (p.19): "The Parties have agreed to complete a final text that lays out a set of disciplines covering a large number of services sectors. Principles of such a text would include . . . dispute settlement, all of which will apply to future laws and regulations . . ." This suggests that a specialized dispute settlement procedure in the field of tradeable services is envisaged, although nothing more is said about it.

C. A summary of what has been agreed upon. In short, Canada and the United States have agreed, when it comes to antidumping and countervail, that there will be no changes in the law, for the moment at least; that if one Party later makes a change, and a panel recommends that the change be modified, and modifications are not made, the injured Party can retaliate or terminate the Agreement; and that ad hoc panels will replace judicial

review of administrative decisions. For other disputes, the two countries have agreed on a process of consultation, mediation, binding arbitration in certain circumstances, and fact-finding, with the ultimate sanction being retaliation by the injured Party.

V. EVALUATING THE AGREEMENT'S DISPUTE SETTLEMENT MECHANISM

An application of the criteria described earlier shows that the dispute settlement mechanisms set forth in Elements of the Agreement are flawed. The consequence is a significant denial of Canadian access to the United States market.

A. The AD/CV mechanism. The mechanisms for settling antidumping and countervailing duty disputes do not meet the criteria we have established.

1. market access

The AD/CV mechanism fails to protect and promote improved market access. It fails to pre-empt U.S. antidumping and countervail remedies, thereby giving up what was described - at least to begin with - as one of Canada's most important negotiating objectives.

Recently there has been some revisionist tendency to retreat from the position that Canada should be exempt from U.S. antidumping and countervail law. Some Americans

have argued that a relatively small percentage of Canadian trade has been adversely affected by U.S. trade remedy laws, and Canadian officials have suggested that there is nothing wrong with sanctions being applied to unfair traders. These opinions are at odds with federal estimates which indicate that between 1982 and 1985, on an average yearly basis, approximately $6.5 billion (Cdn.) of Canadian exports to the U.S. have been affected by U.S. antidumping, countervail and safeguard investigations. This represents approximately 9 percent of total Canadian exports to the U.S. and translates into approximately 170,000 Canadian jobs. When automobile and energy-related exports are subtracted, the proportion of Canadian exports affected by U.S. trade remedies is even higher - approximately 16 percent.

Moreover, the risk of future strategic litigation poses a real deterrent to investment in Canada. If a choice must be made between locating a new factory in Sault St. Marie, Michigan or Sault St. Marie, Ontario, and there are no tariffs to affect the investment decision, the risk of antidumping or countervail litigation will become a substantial deterrent to new investments in Canada. The incentive to choose a U.S. location is enhanced by the fact that the U.S. market is ten times

larger than Canada's. As long as U.S. antidumping and countervail proceedings are a serious risk, most investors will wish to be on the south side of the border.

The Agreement fails to provide any new legal standards to limit the protectionist impacts of U.S. trade remedy laws. All Canada has obtained is a promise not to change the laws to make them even worse, and the prospect of many years seeking a substitute legal regime with no particular reason to anticipate success. Furthermore, the promise not to change laws seems only to apply after the Agreement takes effect, apparently on January 1, 1989: Canada is not able to challenge existing U.S. laws or those that may be passed shortly that do not conform with the GATT or the Agreement, including the pending Omnibus Trade Bill. The Agreement actually creates an incentive for Congress to ensure that all present and anticipated trade conflicts with Canada are resolved by the enactment of restrictive legislation before January 1, 1989.

Moreover, the Agreement will not improve the substantive legal yardsticks for assessing changes in antidumping and countervail statutes. GATT legal standards, which the Agreement incorporates by reference, have failed to adequately control the protectionist

elements of U.S. trade remedy laws. First, the GATT Codes are vague and many key provisions (i.e., "material injury") have never received any authoritative interpretation by GATT panels. For example, the Antidumping Code requires proof of material injury before duties can be imposed. The U.S. statute implementing the Code's material injury test provides that the requisite level of injury must be "not immaterial or insubstantial". No GATT panel has yet reviewed the U.S. administrative and judicial record reflecting its past application of the "not immaterial" version of the GATT test. The lack of authoritative interpretations for many key provisions of the GATT Codes will create uncertainty over the scope for permissible legislative modifications after the Agreement's implementation on January 1, 1989. Given the diplomatic ambiguity and linguistic elasticity of the rules contained in the GATT Codes, most legislative changes could be justified in terms of at least one plausible or reasonable interpretation of the Codes. [For further discussion see, Technical Appendix, pp. A-3 to A-5.]

From a Canadian standpoint, a positive effect of relying on vague GATT legal standards might be that future bilateral panels may thereby possess broad discretion to

rule that proposed U.S. legislative changes are in conflict with GATT law. Whether discretionary powers deriving from the GATT's ambiguity will be employed in an activist manner to limit future protectionist changes in U.S. statutes will be determined by a number of procedural and institutional issues that are not addressed in Elements of the Agreement. For example, the fact that panel members will not be selected for fixed terms but rather will be chosen on a case-by-case basis may influence how activist or deferential future panels will be. Members appointed on an ad hoc basis will tend to be less independent of the signatory governments than panelists appointed for a fixed term if only because the prospect of appointment to future panels will create an incentive to avoid offending either party.

The Agreement imposes a second substantive constraint on future legislative changes to U.S. trade remedy laws - the changes must be consistent with the "object and purposes" of the Agreement. This will be wholly ineffectual to prevent protectionist modifications to U.S. statutes because the Agreement's statement of objectives is phrased in ambiguous, and even contradictory, terms. For example, one declared objective of the Agreement is to maintain "effective disciplines on unfair trade practices". Proposed "reforms" to U.S.

antidumping and countervail statutes are invariably advanced as a means of securing a "level playing field" and preventing further injury to domestic firms from "unfairly-priced" imports.

When it comes to binational panels replacing judicial review, the law to be applied by a panel is the then current domestic law, including administrative practice and judicial precedent. The Agreement does not really control either administrative practice or judicial precedent because administrators and judges may well be interpreting pre-Agreement non-conforming law. As well, there is only one set of U.S. AD/CV laws: if U.S. administrative and judicial decisions on non-Canadian goods begin to incorporate new protectionist interpretations that had not been accepted prior to January 1, 1989, will binational panels be constrained to accept these non-Canadian precedents as determinative of U.S. legal requirements?

The Washington, D.C., law firm of Hogan & Hartson, in its October 15, 1987 submission to the Ontario Cabinet Subcommittee on Free Trade (the "Hogan & Hartson Submission"), said of these binational panels: "Given that both the law and the standard of review will be the same as that employed by the U.S. courts, it is difficult to

conclude that the two systems are likely to lead to different results." [For further discussion see, Technical Appendix, pp. A-6 to A-9.]

2. binding decisions

In respect of disputes involving adverse legislative changes to antidumping and countervail laws, the AD/CV mechanism cannot be regarded as binding. The only sanctions offered are termination of the Agreement and what is, in effect, retaliation. Neither retaliation nor treaty abrogation are meaningful remedies or sanctions for Canada because of the imbalance of power between the two countries. To have only these exacerbates Canada-U.S. inequality of bargaining power, thereby creating the opposite effect to the one desired. Nor are these remedies or sanctions, particularly treaty abrogation, apposite in the "punishment fits the crime" sense. They are dramatic, all-or-nothing devices: a system of tailored intermediate remedies/sanctions would be far preferable.

It is unclear whether panel decisions reviewing antidumping and countervail determinations will be given binding effect under the domestic laws of the parties.

The Agreement will apparently empower binational panels to reverse and remand administrative determinations for remedial action consistent with their findings. But national officials will not be legally constrained to comply with the directives of binational panels unless domestic statutes are amended to provide that such directives are binding and enforceable under the laws of the United States and Canada. Since the legislation and other measures that will be adopted to implement the Agreement have not been announced, it is only possible to speculate on whether binational panel decisions will actually achieve legally binding status after the Agreement's implementation.

3. workability

Can the AD/CV mechanism be regarded as workable? So far as the part dealing with new legislation is concerned, seen from a mechanical point of view, (i) we are not told how a panel is seized of an issue; (ii) there is no explanation of how "compulsory arbitration" will function; (iii) generally, the process is lengthy (apparently, it will take well over one year from the passage of offending legislation - perhaps much longer); (iv) both the prior consultation and panel processes might

be used to throw the state of the law into doubt, thereby creating uncertainty for business planners; and (v), as we have already mentioned, there appears to be no constraints on new laws until the entry into force of the Agreement.

As to binational panels replacing judicial review, (i) it is hard to understand why the one part of the current U.S. process that has not come under criticism from Canada or other countries - judicial review - is the part that has been replaced; the problem with U.S. antidumping and countervail law is administrative, not judicial, discretion; (ii) what is provided is judicial review, and not appeal (judicial review carries with it no fresh evaluation of facts, and a low standard of legal scrutiny); (iii) the consequences of an adverse panel finding are quite unclear; and (iv) the panel arrangement only applies after the Agreement comes into force. [For further discussion **see**, Technical Appendix, pp. A-9 to A-13.]

On the other hand, the Hogan & Hartson Submission notes that under the Agreement a panel will apparently be required to complete its review within 330 days. The Submission comments that "By reaching final judgment within a year the panel could improve significantly on the

time commonly taken by the U.S. Court of International Trade ("CIT") to reach judgment. Further, because the panel is the final appellate body, there would be no possibility of further review of its decisions, unlike the possibility of review of CIT decisions by the Court of Appeals for the Federal Circuit in the United States."

Finally, the general provisions concerning panel composition and procedures are, in their present state at least, unsatisfactory. For example, what does it mean to say "The parties would consult concerning their respective candidates for the roster, but would not be compelled to do so exclusively" (Elements, p.9)? Or, "the investigating authority concerned would take action not consistent [sic] with the decision of the panel, within time limits set by the panel . . ." (p.10)?

4. participation

The AD/CV mechanism as set forth in "Elements of the Agreement" fails to meet the participation criterion. There is apparently no role at all for the provinces and private sector. There is no way for a province or a company to challenge non-conforming U.S. legislation, or initiate or participate in the panel process. Indeed, an

opportunity that now exists - to initiate and participate in judicial review - is lost. At most, provinces and private litigants would have to rely on the Canadian government to take up the cudgels on their behalf. (There is an argument that Canada benefits from depriving the U.S. private sector of the judicial review opportunity. But that opportunity is at least as valuable to Canada as it is to anyone else.)

American lawyers suggest that Congress may not approve of an agreement depriving private parties of a right of appeal from decisions of the Commerce Department and the International Trade Commission. United States implementing legislation may permit private litigants to compel the U.S. government to initiate panel review, or possibly provide for a direct right of private participation. Likewise, Congress may require that private parties whose cases have been reviewed by a panel have the right in U.S. courts to compel compliance by administrative agencies with panel decisions. The full Agreement itself may even allow such rights for both countries.

B. Institutional provisions. The institutional provisions are the general dispute settlement provisions, as distinct from those dealing specifically with antidumping and countervail law. They likewise fail to meet our criteria.

1. market access

Even were the substantive provisions of the Agreement good for market access, the institutional provisions fail properly to protect the substantive provisions and therefore themselves fail to meet the market access criterion. Here the various evaluation criteria, which are always intertwined, are virtually inseparable. How can a non-binding, complex mechanism, that excludes participation by affected constituencies, protect or enhance market access, however good other parts of the Agreement may be?

2. binding decisions

The institutional provisions do not provide for decisions that can properly be regarded as binding. The emphasis is on consultation, mediation and fact-finding. More particularly, if binding arbitration or the

Commission process fails, all the injured Party can do is suspend the application of equivalent benefits. Given economic and political reality, such suspension is less than an effective remedy or sanction. Ultimately, of course, no agreement will succeed unless the parties wish it to succeed. But, in international as in domestic law, effective, realistic, tailored sanctions will encourage the will to succeed, and effective, realistic, tailored remedies will maintain the balance of an operating agreement and make its maintenance attractive. [For further discussion see, Technical Appendix, pp. A-14 to A-20.]

3. workability

As to workability, the institutional provisions are unsatisfactory. For example: (i) the U.S. can "forum-shop" by excluding many disputes from the Agreement and placing them within the GATT; (ii) unlike in the case of binational panels, we are told virtually nothing about the composition of the Commission; (iii) Commission decisions are to be taken by consensus, an unworkable principle (it appears that even the decision to refer disputes (other than safeguard disputes) to binding arbitration must be taken by consensus, which means that Canada has entered

into an Agreement which allows the United States to deny it the right to receive the very arbitration it has demanded); (iv) the notification procedure is unrealistic in requiring a Party to characterize one of its own measures as possibly affecting the operation of the Agreement in a material way; (v) notification after non-conforming measures are implemented is expressly contemplated; (vi) the consultation/mediation process depends entirely on the goodwill of the Parties; (vii) the Commission is apparently simply required "to agree on a resolution of the dispute, which normally shall conform with the findings of the panel . . ." (p.32), which seems unlikely, given the consensus rule and the possible political composition of the Commission; and (viii) the Commission process is complex and multi-faceted, and looks as if it will require at least a year before any particular dispute might be resolved.

4. participation

Finally, on the question of participation, the institutional provisions preclude entirely provincial or private sector participation as of right. Of course, the federal government might designate provincial representatives as members of the Commission and of panels

of experts, and might encourage the Commission to place provincial and private sector representatives on Commission committees and working groups. All that should be encouraged, but it is not enough. We have already noted that the Agreement itself, or implementing legislation, may provide for additional participation rights.

In general, the institutional provisions do no more than establish a procedure closely similar to the GATT dispute settlement mechanism which is already employed to resolve bilateral trade disputes. [For further discussion see, Technical Appendix, pp. A-14 to A-20.]

VI. CONCLUSION

The dispute settlement mechanisms set forth in Elements of the Agreement are ineffective, with the consequence that Canadian access to U.S. markets will not be as enhanced by the Agreement as it might otherwise have been, even where the Agreement has substantive provisions that, on the face of it at least, appear to improve access in some respects. The mechanisms do not preempt U.S. trade remedies which have long been recognized as adverse to Canada. They do not produce binding decisions. They are not particularly workable. They do not, as set forth in Elements of the Agreement, provide for appropriate participation by interested parties. In short, the deficiencies in the dispute settlement mechanisms ensure that the Canadian ambition of increased access to the United States market will not be fully achieved, by this Agreement at least.

DISPUTE SETTLEMENT IN THE CANADA-U.S. TRADE AGREEMENT

TECHNICAL APPENDIX

I. INTRODUCTION

This Technical Appendix develops further some of the observations and conclusions of the main paper. These extensions of the paper include some concrete examples to give a sense of how the Agreement's provisions are likely to change existing laws and practices governing bilateral economic relations.

As described in the paper, the Agreement prescribes several different dispute settlement procedures: (1) a process for resolving disputes over changes in national antidumping and countervailing duty statutes; (2) a procedure for review by a binational panel of final determinations in antidumping and countervail cases; (3) a special "binding arbitration" mechanism to govern bilateral disputes over safeguard measures; and (4) a general dispute resolution procedure, controlled by a new Canada-U.S. Trade Commission, which will be available to resolve all other bilateral disagreements involving an interpretation of the Agreement. Each of these new legal

mechanisms, and their concrete implications for future bilateral trade and investment conflicts, will be discussed in turn.

II. DISPUTES INVOLVING CHANGES IN ANTIDUMPING AND COUNTERVAIL LEGISLATION

Under these provisions of the Agreement, GATT law will be the only substantive constraint on legislative changes to antidumping and countervail laws after entry into force of the Agreement, and until the parties are able to negotiate new legal standards to govern private unfair trade practices and government subsidies that increase exports or reduce imports. This is, of course, merely an affirmation of the present legal position. If the U.S. were to alter its antidumping and countervail laws in ways that conflicted with the GATT Antidumping Code, or the Subsidies and Countervailing Duties Code, Canada could invoke the dispute settlement provisions in Articles XXII and XXIII of the GATT. For all practical purposes, as explained below, the Agreement's binational panel process is legally indistinguishable from the GATT panel procedure. In short, there is no material change in the legal framework that will govern legislative changes in antidumping and countervail laws after the Agreement is implemented.

GATT panels have tended to view their role as one of conciliation rather than adjudication. They have generally avoided any detailed scrutiny of the facts

supporting administrative or executive decisions challenged as violations of GATT legal requirements, and their legal conclusions have often been formalistic and narrowly based. The overall result of this deference to national officials by past GATT panels has been to deprive the GATT's legal standards of any determinate meaning, despite the fact that the multilateral trade treaty is now almost forty years old. Most fundamental legal concepts in the GATT have no generally-accepted legal definitions that provide a benchmark for judging future legislation under the Agreement.

The most important implication of this lack of GATT jurisprudence is that binational panels called upon to assess proposed changes to antidumping and countervail laws in terms of GATT standards will have broad discretion to frame their recommendations for remedial action. From a Canadian standpoint, the only positive outcome is that future bilateral panels might use their broad discretion to rule that proposed U.S. legislative changes are in conflict with GATT law. But there are no other legal changes in the Agreement which suggest that binational panels will be any more activist and independent of signatory governments than GATT panels have been.

Binational panels will be comprised of five members (two chosen by each party and a fifth neutral member); GATT panels are normally composed of five impartial experts. Binational panels will not have standing members appointed for a term of years, but rather will be organized on an ad hoc basis, just as their GATT counterparts. Nor will binational panels possess any greater remedial authority than that which is currently exercised by GATT panels--the power to make recommendations aimed at settling the dispute. Based on past experience under GATT, there is a substantial risk that binational panels, exercising legal powers identical with those possessed by GATT panels and organized in a very similar way, will use their discretion to avoid any direct challenge to proposed amendments to U.S. antidumping and countervail statutes.

III. BINATIONAL PANEL REVIEW OF FINAL DETERMINATIONS IN ANTIDUMPING AND COUNTERVAIL CASES

Other provisions of the Agreement, which are described in the main paper, define the authority of binational panels to review final decisions of antidumping and countervail administrators at the request of either party. A party will be entitled to invoke the binational panel process to attack final determinations of dumping or subsidizing (whether affirmative, negative or mixed) entered by the U.S. Department of Commerce's International Trade Administration ("ITA") or the Deputy Minister, Department of National Revenue--Customs & Excise (the "Deputy Minister") as violations of the Agreement. Decisions in respect of "material injury" entered by either the U.S. International Trade Commission (the "Commission") or the Canadian Import Tribunal (the "Tribunal") in antidumping and countervail cases will also be subject to binational panel review.

The only legal standards to be applied by binational panels in their review of final decisions in antidumping and countervail cases will be national anti-dumping and countervail laws as they exist on January 1, 1989. National statutes and regulations, as interpreted

by domestic administrators and courts, will serve as the legal standards for binational panels until new negotiated standards are in place. New rules to govern national antidumping and countervail laws are to be negotiated by the parties over the next 5 to 7 years.

One legal advantage Canada can arguably derive from this scheme is that it will be an impartial binational panel, not a single U.S. federal court judge, that will determine whether antidumping and countervail decisions are "in accordance with" U.S. law. This advantage is likely to be relatively slight for a number of reasons. First, the panel's scope for review will be quite limited. In deciding whether a final determination is in accordance with U.S. antidumping and countervail law, the binational panel must apply U.S. standards governing judicial review of administrative decisions. Therefore, when a binational panel reviews the decisions of the ITA or the ITC, it will be required to apply the same standard of judicial review as applied by the U.S. Court of International Trade.

The U.S. standard of review requires the Court to uphold an ITA or ITC decision if the administrative or quasi-judicial record contains "substantial evidence" to support findings of fact, and the decision is consistent

with a reasonable or plausible interpretation of the relevant statute law. This is not a very demanding standard to satisfy, and national administrators will continue to possess broad discretion to apply existing U.S. laws in ways that will hinder Canadian exporters by creating costly barriers to entry through antidumping and countervail litigation.

Second, the substitution of a bilateral panel for a single U.S. federal judge is unlikely to bring about any material change in how the "substantial evidence" test will be applied in future U.S. antidumping and countervail decisions. Federal judges are relatively independent from direct political influence and apply a standard of review for conclusions of law which defers to "expert administrative judgment".

There is little, if any, evidence to support the view that curbing judicial discretion will improve access to the U.S. market for Canadian exporters. The main problems for Canadian exporters have been caused by the exercise of administrative discretion at the preliminary stages of U.S. antidumping and countervail proceedings. For example, relatively little evidence is required for domestic industries to initiate an antidumping or

countervail investigation under current U.S. law. U.S. industries whose petitions are eventually dismissed as groundless can impose several months of costly administrative investigation on Canadian exporters.

Third, U.S. statutes are designed to confer broad policy discretion on U.S. administrators. For example, United States statute law encourages the filing of legally insufficient complaints by failing to provide any concrete definition of the types of foreign government programs which may be challenged as countervailable subsidies. Unemployment compensation, regional development grants and the prices charged to private companies for government-owned timber in Canada have all been recent targets of U.S. countervail investigations. Binational panels will be constrained to recognize that U.S. administrators have been empowered by Congress to exercise broad discretion since their review will be limited to questions of compliance with U.S. law.

Moreover, U.S. rules of evidence and burdens of proof permit official investigators to reach preliminary determinations of dumping or of subsidized imports on the basis of highly incomplete and often conflicting evidence. For example, U.S. administrators may reject the

exporter's accounting records as unreliable or insufficient, and then proceed to estimate the "margin of dumping or subsidization" on the best information available, which is usually the allegations in the petitioner's antidumping or countervail complaint. In the 1986 affirmative preliminary determination in respect of softwood lumber from Canada, the ITA accepted a number of the allegations in the U.S. industry's complaint in respect of provincial government stumpage programs because it found that the rebuttal evidence offered by the provinces was either insufficient or not satisfactorily verified.

The critical problem for Canadian exporters has been adverse administrative decisions at the preliminary stages of antidumping and countervail actions. Antidumping and countervailing duty relief is assessed on a provisional basis early in the enforcement process (usually within 85 to 160 days). These duties must be paid (or equivalent security posted) when imported goods subject to provisional duty enter at customs. National administrators collect the duties months, and sometimes years, in advance of the completion of the proceedings (when they may be refunded if the petition is dismissed). A preliminary determination of antidumping or

countervailing duties often results in capitulation by respondent-exporters. The respondent-exporters either voluntarily raise their prices (to eliminate the margin of dumping or subsidization) or limit their export shipments. In U.S. countervail cases, such as the recent softwood lumber case, foreign governments have agreed to repeal subsidies, or impose export taxes or quotas, in order to avoid final affirmative determinations.

Antidumping and countervail proceedings are encouraged by permissive preliminary determinations because they allow U.S. industries to impose significant litigation costs on their foreign rivals at an early stage of the action without having to bear similar or proportionate costs, regardless of the substantive merit of the petitioner's allegations.

The prospect of review by a binational panel after an affirmative final determination is incapable of deterring U.S. industries from filing groundless antidumping and countervail petitions leading to expensive investigations and affirmative preliminary determinations. Under U.S. law, a review for "substantial evidence" in the record after a final determination in an

antidumping or countervail proceeding focuses only on the final decision and is based on all the evidence in the investigative record. There is no review on the issue of the sufficiency of the evidence to justify the initiation of an investigation, nor may the panel review the sufficiency of the evidence to support an affirmative preliminary determination. Therefore, discretionary judgments at the preliminary stages of the proceeding will be unreviewable, and it is these administrative decisions which have contributed most importantly to the creation of incentives for U.S. industries to employ antidumping and countervail actions as a competitive strategy for imposing costs on their foreign competitors. The Agreement's binational panel process, which will review only final antidumping and countervail orders, will not be able to exercise any significant control over the preliminary stages of U.S. trade remedy investigations.

The only possible legal advantage that could be derived for Canadian exporters is that binational panels will be required to conduct their reviews and issue their decisions within a period of about 10 months. Review by the Court of International Trade currently takes approximately 2 years, and several cases have required 3 or 4 years. The ability to obtain review more quickly may

discourage Canadian exporters and the Canadian government from entering into onerous settlements, such as in softwood lumber, when the legal merits of the U.S. industry's case are weak.

As indicated earlier, the magnitude of this advantage depends on whether the binational panel acts in ways markedly different from the U.S. federal courts in reviewing final determinations. Since binational panels will apply U.S. law, and employ the same permissive standards for review as U.S. courts, there is no rational basis for expecting any material improvements in the administration of U.S. antidumping and countervail laws as a result of the Agreement.

IV. DISPUTE SETTLEMENT FOR SAFEGUARD ACTIONS

The Agreement provides new substantive rules to govern safeguard actions against fairly-priced imports from either party and incorporates a new "binding arbitration" mechanism to review findings by national officials that imports have caused serious injury to a competing domestic industry and should, therefore, be subject to safeguard restrictions (i.e., duties or quotas). In the recent past, there have been frequent bilateral disputes over formal safeguard actions and quasi-formal arrangements such as the voluntary export restraint agreements which apply to U.S. steel imports. Given this history of conflict, it was hoped that the Agreement would impose effective restraints on the use of safeguard protection by the U.S.

Article XIX of GATT imposes two basic limitations on the power of national governments to take safeguard action against imported products. First, it must be determined by national administrators that the domestic industry has suffered "serious injury" as a result of imported products. Second, the home jurisdiction of the exporter whose trade is restricted as a result of safeguard measures is entitled to take retaliatory action

against exports from the safeguarding nation. Tit-for-tat retaliation has become more frequent in recent years. For example, Ottawa's response to the recent safeguard action by the U.S. shake and shingle industry was to impose a retaliatory tariff on books and other consumer goods imported from the United States.

The Agreement will supplement these two GATT principles with additional substantive standards which will apply exclusively to bilateral trade. First, Canadian imports will be exempt from U.S. safeguard action unless they amount to "substantial imports" (i.e., at least 5% to 10% of total imports). Second, the "substantial" Canadian imports must be found to "contribute importantly" (defined as "an important cause but not the most important cause") to the serious injury of the U.S. industry. If these two additional tests are satisfied, Canadian imports will be subject to safeguard duties or quotas aimed at reducing imports to non-injurious levels.

Only time will tell whether these new standards will be applied to benefit Canadian exporters who are frequently caught up in U.S. safeguard actions aimed at European or Pacific Rim nations. In cases like shakes and

shingles, where all or most of the U.S. imports originate in Canada, it will not change the outcome. In cases like specialty steel, where Canadian imports usually account for a relatively small portion of total U.S. imports, the new rules could provide Canadian exporters with a valuable exemption. The critical determinant of the future impact of the new rules will be how they are interpreted and applied in resolving disputes arising under the Agreement.

The institutional provisions of the Agreement provide that the Canada-U.S. Trade Commission (the "Commission") "shall refer all disputes under the safeguard chapter and the Commission may refer any dispute under any other chapter to binding arbitration on such terms and in accordance with such procedures as the Commission may adopt." This is the only reference to "binding arbitration" in the entire transcript of the Agreement. How this procedure will compare with the dispute resolution mechanism presently available to resolve bilateral safeguard disputes under the GATT is uncertain.

Under the GATT, bilateral disputes in respect of safeguard actions are resolved through a conciliation process which includes the involvement of GATT panels.

GATT panels have been ineffective for several reasons, some of which were discussed earlier. Partly because of their ad hoc organization and partly because of the GATT's emphasis on conciliation and compromise, these panels have avoided any review of the evidentiary bases for decisions to grant safeguard protection. In addition, the panels have been handicapped by lack of any effective enforcement procedures. If a GATT panel recommends that a government withdraw or modify safeguard protection, and if the government refuses to do so, the only remedy available is that the complaining nation may be authorized to retaliate against the offender's exports. The only limitation on retaliation is that it must have similar trade restrictive effects to the measure imposed in violation of the GATT rules governing safeguard actions.

The description of the Agreement fails to provide any concrete details on the process of "binding arbitration" that will be employed to resolve disputes concerning the interpretation of the Agreement's new standards for safeguard action. Whether binding arbitration will be similar to the binational panel process discussed earlier, or whether it will involve a new set of specialized procedures, are questions that will have to be resolved after the formal legal text is

available. It is certain, however, that any future arbitral tribunal will not obtain any remedial powers more extensive then those granted to the binational panels created to deal with antidumping and countervail actions. As for the remedies available at the conclusion of "binding arbitration", the Elements of the Agreement states:

> "[i]f a Party or its subdivisions fails to implement in a timely fashion the findings of a binding arbitration panel regarding its measure or measures and the Parties are unable to agree on appropriate compensation, then the other Party shall have the right to suspend the application of equivalent benefits of the Agreement to the non-complying Party." (p. 30)

In other words, if a party refuses to comply with the decision of the arbitrators, then the other party may retaliate. This is simply the existing GATT remedy of self-help, hardly a legally binding process from any practical standpoint.

V. GENERAL DISPUTE RESOLUTION MECHANISM

The Agreement's "institutional provisions" appear to also create a general or residual dispute settlement process controlled by the Commission. If either party's representatives on the Commission insist, a dispute over the interpretation of the Agreement (other than disputes over antidumping, countervail or safeguard actions) may be referred to a bilateral panel. The panel will analyze the dispute, find the facts, determine whether the Agreement has been violated and recommend appropriate remedial action. If the panel's recommendations are not carried out, the aggrieved party will be entitled to retaliate against the offending party by withdrawing equivalent concessions or by total abrogation of the Agreement.

Perhaps the definitive text will contain some surprises, but this procedure is identical to the GATT dispute settlement mechanism which is currently employed to resolve the vast majority of bilateral trade disputes. It is difficult to see how this new general dispute settlement mechanism will improve market access for Canadian exporters. Moreover, as with the GATT panel process, the Agreement's dispute settlement procedure ensures that the central governments will continue to

exercise a monopoly over the management of bilateral trade relations; this monopoly will prevent the provinces from acting to advance the interests of their constituents when federal and provincial interests clash.

In conclusion, the real gains in bilateral dispute resolution that would be secured by the Agreement are negligible. Canada has merely obtained a commitment from the U.S. to negotiate for something better, without any concrete, mutually-agreed definition of what that might be.